

REMARKS

This amendment is responsive to the Office Action of March 27, 2008. Reconsideration and allowance of claims 2-10, 12, and 14-23 are requested.

The Office Action

Claims 1-4, 6-9, 11-13, and 16-19 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Seely et al. US2003/0117296.

Claims 5, 10, 14, and 15 stand rejected as unpatentable over 35 U.S.C. § 103(a) over Seely in view of Nappholz et al. US 5,792,198.

Claims 16 and 17 stand rejected under 35 U.S.C. § 112, first paragraph.

Claim 12 stands rejected under 35 U.S.C. § 112, second paragraph.

The Claims are Supported by the Written Description

As per claim 16, the Examiner asserts that the threshold level and the histogram data measured below a threshold level are not supported by the specification. However, claim 16 is supported by the specification on page 6, lines 9 - 13, in which a "current lower and upper alarm limits of the measurement shown as a histogram readout". As per the Webster's Ninth New Collegiate Dictionary the definition of a limit is "enclosed within a boundary or bounds", while the same dictionary defines a "threshold" as "an end or boundary". Clearly the term 'threshold' is interchangeable with the term 'limit' because both terms describe a boundary as the word "boundary" is common to both definitions. Thus "limit" in the specification supports "threshold" in the claim language. Similarly, the "current lower alarm limits of the measurement shown as histogram readout" as disclosed in the specification on page 6, lines 9 - 13 support the "histogram data measured below a threshold level" in the claim language because a "lower limit" is a concept identical to "below a threshold level" in that both phrases identify a lower boundary level below which a value is identified as exceeding a boundary at the lower level of a range of histogram data values.

As per claim 17, examiner states that the meaning of selectably sized bins is not clear. However the specification, on page 6, lines 20-22, discloses that the width of the bins is "set by the user by means of the resolution of the predefined bin

width". The specification on page 4, lines 14-16 discloses that "the histogram readout is formed by the time distribution of numerical measured values in histogram columns that are definable by the user and are referred to as bins". Thus the width of the bins is defined by the user and these bins are the columns in the histogram.

The Claims are not Anticipated by Seely

Claim 5 calls for outputting a cumulative curve combined with a histogram. Nappholz fails to cure this shortcoming. Nappholz mentions a "cumulative histogram" (col 6, line 47) but does not disclose or fairly suggest displaying a histogram and a cumulative curve combined.

Moreover, Nappholz does not explain what the cumulative histogram is, but rather, refers the reader to another patent (col. 6, line 26). It is submitted that the examiner should cite to the base reference rather than a reference that merely alludes to the base reference without a full description of the subject matter alluded to.

Dependent claim 20 further emphasizes this distinction by calling for the cumulative curve and the histogram to be displayed superimposed on common axes.

Accordingly, it is submitted that claim 5 and claims 2-4, 6-10, 12 and 20-22 depend therefrom distinguish patentably over the references of record.

The Claims Are Not Taught By Seely In View Of Nappholz

Claim 15 calls for a device that generates a cumulative curve indication concurrently with a histogram. While the Nappholz reference arguably mentions a cumulative histogram, the device does not display a histogram in combination with the cumulative curve.

New independent claim 23 has been added to emphasize the subject matter of dependent claims 4 and 21 in apparatus format.

Seely and Nappholz are not Properly Combinable

The Seely reference arguably discloses a method and apparatus for monitoring patient in a medical intensive care unit. Seely is an external monitoring device and is not surgically inserted into a patient at any time during the treatment. Nappholz arguably teaches a medical device, but the references a device directed

particularly toward heart pacemakers to be inserted invasively into a patient's body, wherein the device is usable one the patient leaves the hospital or is outside of an intensive care unit. The pacemaker has no display. Seely, being intensive care unit specific, resides in an entirely different art than does the Nappholz device which is inserted internally and is specific to heart pacemakers. Thus both devices perform substantially different functions in substantially different ways.

Seely uses relative frequency histograms to display output and does not use a cumulative curve. Nappholz uses a cumulative histogram, not as a display output, but to recalculate the the generate a new RF profile (Fig. 8) which is also not a display. The new RRF profile governs the stimulus frequency in accordance with a level of the patients physiological activity over the preceding month or so.

Thus, Seely generates a display; whereas, Nappholz generates an internal mathematical function that is not display.

The fact that these two references perform in substantially different functions in substantially different ways to produce substantially different results indicates that it would not have been obvious to combine these two references. Furthermore, the lack of obviousness denotes improper hindsight in combining two disparate references. One of ordinary skill would not have thought to combine Seely with Nappholz without the beforehand knowledge of the intended resulting device.

Furthermore, the Examiner has not presented any teaching, suggestion or motivation whatsoever to combine the references of Seely and Nappholz. The Examiner merely states it would be obvious to combine these references but does not present any reason why one would do this, and does not present any benefit to making this questionable combination. Therefore, the combination of the references is not valid under 35 U.S.C. § 103 and the resulting argument of obviousness is not valid.

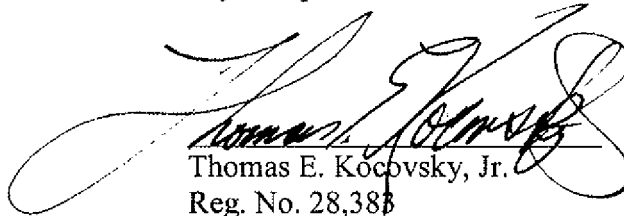
CONCLUSION

For the reasons set forth above, it is submitted that claims 2-10, 12, and 14-23 distinguish patentably over the references of record and meet all statutory requirements. An early allowance of all claims is requested.

In the event the Examiner considers personal contact advantageous to the disposition of this case, she is requested to telephone Thomas E. Kocovsky, Jr. at (216) 861-5582.

Respectfully submitted,

Fay Sharpe LLP

A large, stylized handwritten signature in black ink, which appears to read "Thomas E. Kocovsky, Jr.", is written over a horizontal line.

Thomas E. Kocovsky, Jr.
Reg. No. 28,388
1100 Superior Avenue
Seventh Floor
Cleveland, OH 44114-2579
(216) 861-5582